IN THE SUPREME COURT OF FLORIDA

PAUL B. JOHNSON, :

Appellant, :

vs. : Case No. SC14-1175

STATE OF FLORIDA, :

Appellee. :

_____ :

APPEAL FROM THE CIRCUIT COURT
IN AND FOR POLK COUNTY
STATE OF FLORIDA

REPLY BRIEF OF APPELLANT

HOWARD L. "REX" DIMMIG, II
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

JOHN C. FISHER
Assistant Public Defender
FLORIDA BAR NO: 0999865

STEVEN L. BOLOTIN
Assistant Public Defender
FLORIDA BAR NUMBER O236365

Public Defender's Office
Polk County Courthouse
P. O. Box 9000--Drawer PD
Bartow, FL 33831
(863) 534-4200

ATTORNEYS FOR APPELLANT

TABLE OF CONTENTS

TABLE OF CITATIONS

ISSUE I

THE TRIAL COURT ERRED BY PREVENTING APPELLANT FROM WAIVING HIS RIGHT TO PAROLE AND EX POST FACTO CLAIMS AND BY EXCLUDING THE WAIVER OF PAROLE AS MITIGATION

A. Standard of Review

The state asserts that the standard of review for this issue is whether the trial judge abused his discretion in ruling that Johnson was precluded from waiving his right to parole eligibility and his protection against ex post facto laws. (State's answer brief [SB], p. 24). Judge Jacobsen, however, said he was persuaded by Johnson's constitutional arguments, and he would have been inclined to allow the waivers if he thought he had any discretion to rule that way (5/813-14).

The "abuse of discretion" standard asserted in the state's brief is inconsistent with the state's own contentions on appeal, i.e., (1) that allowing this defendant (or any capital defendant) to waive his right to parole eligibility would result in an illegal sentence which may not be imposed under any circumstances, even by agreement (SB 25); that "[t]he trial court was bound by established caselaw", specifically Bates v. State, 750 So.2d 6 (Fla.1999) and Orme v. State, 25 So.3d 536 (Fla.2009)(SB 24-25); and (3) that this Court should decline to recede from Bates and Orme (SB 25,27). [The state's comment that "Johnson concedes that both cases are controlling" (SB 25) is not entirely accurate. While the defense contended in the trial court and continues to contend on appeal that Bates and Orme were wrongly decided both as a matter of state law and under Eighth Amendment constitutional

principles (4/693-700; 5/810-11; 15/5-9; Johnson's initial brief, p. 38, 40-46, 49-50), the defense also contended and continues to contend that Bates and Orme are materially distinguishable from Paul Johnson's situation, since here the jury was well aware that Johnson had already served more than 25 years in prison at the time of his resentencing trial. (See 4/695-96; 5/812-13; Johnson's initial brief, p. 48-49)].

The potential impact on a capital jury of being instructed that its only sentencing alternatives (for a defendant whose crimes occurred 32 years before the resentencing trial) are death or life imprisonment without the possibility of parole for 25 years involves much more than "what the jury may consider in mitigation" (SB 24). It also involves the danger that jurors may choose death based in whole or in part on a "reflexive fear" that the defendant may someday - - maybe even soon - - be released. See Urbin v. State, 714 So.2d 411,420 (Fla.1998); Perry v. State, 801 So.2d 78,83 (Fla.2001); Simmons v. South Carolina, 512 U.S. 154,159,163-64 (1994). See also Norris v. State, 429 So.2d 688, 690 (Fla.1983)(concern over the possibility that a capital defendant may be paroled someday is "an improper consideration by judge or jury"). This kind of fearful speculation is actually worse than a nonstatutory aggravating factor, because it is not subject to the rules of evidence and it cannot be effectively rebutted. To allow Johnson to waive his rights and accept a sentence of life imprisonment without parole - - and to have the jury then be correctly instructed that that sentence was the alternative to the death penalty - - would have ameliorated this danger; it would have prevented an unreliable jury death recommendation in viola-

tion of the Eighth Amendment; and it would not have harmed the prosecution's legitimate interests in any way.

To the extent that this issue involves - - among many other factors - - constitutional questions of what the jury may consider in mitigation (see SB 24), any discretion the trial judge may have is sharply limited by the principles recognized in such decisions as Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982). See e.g., Ford v. State, 802 So.2d 1121, 1136 (Fla.2001) (recognizing that parole ineligibility is mitigating in nature, and reasonably may serve as a basis for imposing a sentence less than death).

Judge Jacobsen expressed his awareness that his ruling might be wrong and that it might ultimately result in reversal (5/814). Yet he also understood that a Florida trial judge is required to adhere to existing precedent established by the Florida Supreme Court, even if he believes the law should be otherwise. While this Court is free to reevaluate its own prior decisions, especially when constitutional considerations are involved [see Part B of this reply brief regarding stare decisis], a trial judge is without authority to do so. Unless he can materially distinguish the prior case law, he has no choice but to follow it. See State v. Lott, 286 So.2d 565,566 (Fla.1973); State v. Dwyer, 332 So.2d 333,335 (Fla.1976); Mazzara v. State, 51 So.3d 480,484 (Fla.1st DCA 2010).

In the instant case, Judge Jacobsen didn't think the factual difference in the length of imprisonment already served was "sufficient enough of a distinction for me to fly in the face of two Florida Supreme Court opinions [which] basically say I can't

do that, or that he can't do that" (5/813). Therefore, he concluded (correctly, unless he was wrong about the situations not being distinguishable) that he was bound by Bates and Orme, and he was not free to do anything other than preclude Johnson from waiving his right to parole eligibility and his protection against ex post facto laws (5/813-14; 15/16, 22/1483). However, Judge Jacobsen made it equally clear that he found Johnson's constitutional arguments to be persuasive and logical, and but for his being bound by Bates and Orme - - in other words, if it was within his discretion to do so - - he would have been inclined to allow Johnson to waive his rights.

> And, Ms. Garrett, I liked one of your lines that we might be back on yet another penalty trial, but that's up to the Supreme Court. And when I look at this, I don't see where I have at my level of court the ability to when, in essence, is overrule the Supreme Court's decision on this subject.

(5/814; see 4/695).

So, in light of the state's contention that the standard of review for this issue is abuse of discretion, then it would follow that Judge Jacobsen abused his discretion by failing to exercise it, in the mistaken belief that he had no discretion. This, in and of itself, would be reversible error. See, e.g. King v. State (Fla.5th DCA 2015)[2015 WL 2129482]; Uprevert v. State, 507 So.2d 162,164 (Fla.3d DCA 1987); Doe v. State, 499 So.2d 13 (Fla. 3d DCA 1986); see also State v. Barrow, 91 So.3d 826,835 n.9 (Fla.2012). However, Johnson recognizes that, notwithstanding the state's contention, this Court probably will (and probably should) conclude that this is primarily a legal issue involving such matters as (1) the contours of the doctrine of stare decisis; (2) the

meaning of the term "illegal sentence" under Florida law; and (3) the Eighth Amendment requirement of heightened reliability in capital sentencing; and will conclude that the standard of review is de novo.

B. Stare Decisis

The state contends that this Court should not recede from Bates and Orme (SB 24-25). Its argument as to why it believes the Court should not recede from Bates and Orme - - like the decisions in Bates and Orme themselves - - is almost entirely based on Florida case law, which primarily evolved in the context of noncapital sentencing, regarding the concept of an "illegal sentence" which can be corrected at any time, and which may never be imposed even by agreement of the parties. See Bates, 750 So.2d at 11 and Williams v. State, 500 So.2d 501 (Fla.1986)(SB 25). Johnson's constitutional claim that refusal to allow him to waive his parole eligibility and his protection against ex post facto laws violates the Eighth and Fourteenth Amendments' requirement of heightened reliability in capital sentencing is neither refuted nor even mentioned in the state's brief (SB 21, 24-27). The state completely ignores the decisions of at least five appellate courts of last resort which (recognizing many of the same principles discussed by Justice Anstead, joined by Justices Pariente and Kogan, in his dissent in Bates) have held that a capital defendant must be allowed to waive his right to parole eligibility in these circumstances (SB 21, 24-27; see Johnson's initial brief, p. 40-41, 44-46). In keeping with its strategy of portraying this issue as being solely a matter of Florida sentencing law and statutory

construction, the state does not even cite or discuss any of the cases from other jurisdictions which go in its favor. [Two of those states are mentioned in Johnson's initial brief, p. 42, and after further research undersigned counsel have discovered three more. See p. 25 and n.3 of this reply brief].

The doctrine of stare decisis does not mean that a state's highest appellate court should follow its prior precedent for the same reason Mallory climbed Everest; "because it's there." Stare decisis "does not command blind allegiance to precedent." State v. Sturdivant, 94 So.3d 434,440 (Fla.2012); State v. Green, 944 So.2d 208,217 (Fla.2006); State v. Gray, 654 So.2d 552,554 (Fla. 1995); see Arizona v. Gant, 556 U.S. 332,350-51 (2009). There are sound jurisprudential reasons for the doctrine of stare decisis -- it "provides stability to the law and to the society governed by that law"[1] - - and all other things being equal or even close to equal it ordinarily makes sense to continue to adhere to existing precedent. On the other hand, "[p]erpetuating an error in legal thinking under the guise of stare decisis serves no one well and only undermines the integrity and credibility of the court." State v. Gray, supra, 654 So.2d at 554; Delgado v. State, 776 So.2d 233,241 (Fla.2000); see also State v. Sturdivant, supra, 94 So.3d at 440; Puryear v. State, 810 So.2d 901,905 (Fla.2002); Westgate Miami Beach, Ltd. V. Newport Operating Corp., 55 So.3d 567,574 (Fla.2010)(recognizing that "an error in legal analysis" in the prior decision or decisions is a valid reason not to adhere to stare decisis).

[1] State v. Green, supra, 944 So.2d at 217; State v. Gray, supra, 654 So.2d at 554; Puryear v. State, 810 So.2d 901,905 (Fla.2002).

Moreover, the United States Supreme Court has recognized that stare decisis carries significantly less weight when constitutional issues are involved. See Arizona v. Gant, supra, 556 U.S. at 350-51; Vieth v. Jubelirer, 541 U.S. 267,305 (2004); Payne v. Tennessee, 501 U.S. 808,827-28 (1991).

A series of decisions by the Supreme Court of Mississippi provides a template for this Court to avoid perpetuating the constitutional error in Bates and Orme. Mississippi's Bates was Lanier v. State, 635 So.2d 813 815-19 (Miss.1994), and its Orme was Patterson v. State, 660 So.2d 966,967-69 (Miss.1995). In both decisions, the appellate court held that a defendant could not be sentenced to life imprisonment without parole - - even when the defendant voluntarily waived any right to apply for parole as part of an agreement with the prosecution not to seek a death sentence - - because the statute did not provide such a penalty.

A few years later, in Barnett v. State, 725 So.2d 797,801-02 (Miss.1998), a capital defendant (who was sentenced to life without parole after a trial and penalty phase) complained on appeal that his sentence violated the ex post facto laws of the state and federal constitutions:

> [The victim] was killed in 1992. Under the applicable statute, a jury could sentence Barnett to either death or life in prison. Miss.Code Ann. §97-3-21. That provision was amended in 1994 to allow the option of life in prison without parole. The jury sentenced Barnett to life without parole, a punishment that was not permitted under the statute in effect when the crime was committed. Thus, he argues that his sentence is void. We cannot agree for reasons set out below.

725 So.2d at 801

The appellate court noted that Barnett never objected to the life without parole sentencing option until after the verdict was

returned:

> . . . [W]e have, on occasion, ordered that the without parole option be allowed to defendants facing trial after the statute was amended for capital offenses occurring before the enactment of the amendment. E.g., Woodward v. State, 95-0144, 9/11/95 Order (issuing mandamus ordering trial judge to apply amended statute). There, we reasoned that a sentence of life without parole is ameliorative (and thus did not pose an ex post facto problem) in that it provides a punishment less harsh than death. See also Lockett v. Ohio, 438 U.S. 586, 598, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)(stating that capital juries must be allowed to hear any evidence that would tend to support a sentence less than death); Zant v. Stephens, 462 U.S. 862, 884-85, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983)(announcing the heightened need for reliability and due process in capital cases because death is a punishment different from and more severe than all others).
>
> In this case, although the record does not reflect a specific request by the defendant, it is clear Barnett was aware that the sentencing option of life without parole would be given to the jury, and it is also clear that he relied upon the option he now complains of to escape the harsher penalty of death. We refuse to allow Barnett to now claim that a life without parole sentence violates ex post facto laws. Barnett waived his ex post facto claim with respect to the life without parole sentencing option adopted in 1994.

725 So.2d at 801-02(emphasis supplied).

Plainly, if a defendant can waive his parole eligibility and his protection against ex post facto laws simply by failing to object to retroactive application of a life without parole sentencing option as in Barnett, then it logically follows that a voluntary and intelligent waiver of those rights - - as was offered by Paul Johnson in the instant case - - is also valid. See State v. McDonnell, 987 P.2d 486,495 (Ore.1999), discussing the import of the U.S. Supreme Court's decision in Lynce v. Mathis, 519 U.S. 433 (1997)(a decision cited in the state's answer brief, p. 26). Even the dissenting Justice (McRae) in Barnett recognized that distinction: "While the majority contends that

Barnett waived his ex post facto claim, it must be noted that for such a waiver to be valid, Barnett must have knowingly and intelligently waived that specific constitutional right. Barnett did not, and the trial court made no effort to see that he did. The majority is reading into the record a waiver that was not made specifically." 725 So.2d at 803.

See also West v. State, 725 So.2d 872 (Miss.1998), decided two weeks after Barnett, recognizing that in the context of capital sentencing, the option of life without parole is actually ameliorative. Echoing Barnett, and again citing Lockett's and Zant v. Stephens' Eighth Amendment heightened reliability principles, the court said "[i]t hardly needs restating that death penalty jurisprudence revolves around a theme that any quality of a life sentence is a favorable option to death, the final and ultimate sentence." 725 So.2d at 879.

The Mississippi Supreme Court held in West that the amendment of the capital sentencing statutes to include a life without parole alternative "ameliorates the stark options that were presented to pre-amendment juries", and therefore "its retroactive application does not give rise to an illegal ex post facto law." 725 So.2d at 880. But even if it did:

> West is entitled to receive the benefit of the amended §97-3-21 since he plainly waived any arguable ex post facto claim. It is clear, as demonstrated earlier in this opinion that the sentence in question is permitted by the statute as passed by the legislature. West's constitutional right to be free from an ex post facto sentence is subject to a knowing waiver.

725 So.2d at 880-81.

After quoting West's waiver colloquy, the court gave an update of the proceedings in its prior Lanier case:

> A similar waiver enabled Johnny Rufus Lanier, another of this State's capital defendants, to obtain a sentence of life without parole, notwithstanding the fact that his crime and conviction occurred prior to the provision of such a sentencing option. Lanier had first entered a plea agreement in which he agreed to be sentenced to life without parole in exchange for the State's foregoing any right to seek a death penalty. At the time of this deal, the law did not allow any sentence of life without parole for capital defendants. This Court reversed that sentence on the grounds that Lanier could not form a contract to obtain an otherwise illegal sentence. Lanier v. State, 635 So.2d 813 (Miss.1994).
>
> Following that reversal §97-3-21 was amended to provide the option of life without parole to capital defendants. Lanier's sentencing judge conducted a colloquy in which he asked Lanier repeatedly whether he wanted to waive any ex post facto rights that he might have in not being sentenced to life without parole. After finding that Lanier had waived his rights to both a sentencing trial and the avoidance of ex post facto applications, the court ordered Lanier to serve life without parole.

725 So.2d at 881.

The West court then pointed to three other trial court cases where "capital defendants whose crimes were committed before the effective date of the amendment have received the amendment's benefit after waiving any ex post facto claims." 725 So.2d at 881.

West's death sentence was reversed. On remand West's new jury returned a verdict of life without parole. West v. State, 820 So.2d 668,669 (Miss.2001).

Finally, in 2004, the Supreme Court of Mississippi - - having already rejected in substance the flawed legal analysis of Lanier and Patterson - - expressly overruled them. Twillie v. State, 892 So.2d 187 (Miss.2004).

For the reasons expressed in Johnson's memorandum of law and his argument in the trial court, and in his initial brief and this reply brief, Bates and Orme are wrongly decided both as a matter

of Florida sentencing law [see Part C and D, infra] and as a matter of Eighth Amendment death penalty reliability principles [see Part E and F infra]. This Court should follow Mississippi's lead and overrule them.

C. Retroactive Application and Legislative Intent

> The presumption against the retroactive application of new laws is an essential thread in the mantle of protection that the law affords the individual citizen. That presumption "is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." Landgraf v. USI Film Products, 511 U.S. 244, 265,114 S.Ct.1483,1497, 128 L.Ed.2d 229 (1994). This doctrine finds expression in several provisions of our Constitution. The specific prohibition on ex post facto laws is only one aspect of the broader constitutional protection against arbitrary changes in the law. In both the civil and the criminal context, the Constitution places limits on the sovereign's ability to use its lawmaking power to modify bargains it has made with its subjects. The basic principle is one that protects not only the rich and powerful, United States v. Winstar Corp., 518 U.S. 839, 116S.Ct. 2432, 135 L.Ed.2d 964(1996), but also the indigent defendant engaged in negotiations that may lead to an acknowledgment of guilt and suitable punishment.

Lynce v. Mathis, 519 U.S. 433,439-40 (1977)(emphasis supplied)

The state in its answer brief in the instant case, citing Lynce, argues (SB 26):

> A statute violates the constitutional prohibition against ex post facto laws when it increases punishment for a criminal offense after the crime was committed. Lynce v. Mathis, 519 U.S. 433 (1997). There is no dispute that the 1994 amendment, if the State sought to apply it to Johnson, would constitute an ex post facto violation. See, e.g., California Dept. of Corrections v. Morales, 514 U.S. 499 (1995).

Johnson agrees with the above statement (although the amendment does have ameliorative aspects when a death penalty resentencing trial is taking place; see Bates, 750 So.2d at 20-22

(Anstead, J., joined by Pariente, J., and Kogan, Senior Justice, concurring); West v. State, supra, 725 So.2d at 879-80). If the state sought to apply the 1994 amendment to Johnson and if Johnson did not waive his right to be protected against ex post facto laws, it most certainly would "constitute an ex post facto violation" (SB 26). However, Johnson knowingly and voluntarily waived that right (5/869-71). The state responds in its answer brief (SB 26):

> A willingness to waive a constitutional right, however, does not result in an obligation by the State to place the defendant in such a position where such a waiver would be necessary.

Undersigned counsel for Johnson frankly do not understand what that assertion even means. Johnson was not seeking to place the state in any position. He was simply seeking to waive a right - - a right which conferred a "benefit" of parole eligibility which he and his trial counsel knew was illusory - - in order to prevent the jury from improperly considering his speculative parole eligibility as a reason to recommend a death sentence. As Justice Anstead recognized in his Bates dissent, 750 So.2d at 21-22:

> What then is a possible reason that waiver would not be permitted where the waiver would be perfectly consistent with prevailing public policy and the only one affected by the more severe sentencing option is the defendant? One can only speculate that it would be to deprive the defendant of the benefit of the appeal to be made to sentencing juries and judges under the 1994 sentencing scheme that if they choose a life sentence over death they can be assured that life means life and the convicted murderer will not be eligible for parole.

The state, however, continues (SB 26-27)(emphasis supplied):

> The 1994 amendment was not retrospective in application; the statute is plain on its face and the legislature did not incorporate any of the language necessary

> to accomplish retroactivity. State v. Lavazzoli, 434 So.2d 321 (1983). Johnson's offer to accept the 1994 amendment and waive his constitutional rights in order to do so is meaningless, as he was not actively facing an ex post facto violation. He has no constitutional right to select which statute should apply to him merely because one suits him better than another. His offer to waive ex post facto is merely that - an offer, unilaterally made by the defense, rejected by the State.

As will be shown in Part D, infra, addressing the meaning of the concept of an "illegal sentence" which cannot be imposed even by agreement of the parties, it is the state - - not Johnson - - which obstinately blocks a capital defendant's waivers of parole eligibility and ex post facto protection when it suits them, yet proposes and insists on such waivers as part of a sentencing agreement when that suits them (see 5/811).

Constitutional and statutory presumptions against retroactive penal laws are for the protection of accused citizens and civil litigants. Lynce. The state, citing Lavazzoli, correctly observes that in enacting the 1994 life without parole amendment the legislators "did not incorporate any of the language necessary to accomplish retroactivity." But there is an obvious reason why they didn't - - it is because they knew they couldn't. Section 775.082(1) applies to all persons convicted of first degree murder, and the vast majority of those are sentenced to life imprisonment (1) when the prosecution doesn't seek death, (2) when the jury recommends life, or (3) when the judge overrides a death recommendation and imposes a life sentence. As to any of these defendants who were sentenced (for crimes committed prior to 1994) to life imprisonment with parole eligibility after 25 years it would be an obvious ex post facto violation if the state were to

revoke their parole eligibility or if - - on resentencing for the same crime - - a judge were to impose life without parole. The legislators would certainly have been aware of this. See Bates, 750 So.2d at 18-19 and n.5 (Harding, C.J., joined by Wells, J., specially concurring)("if the Legislature had clearly expressed such an intent" [to apply the more onerous life without parole amendment retrospectively] "I believe that the statute would be vulnerable to a constitutional challenge on ex post facto clause grounds).

The legislature cannot simply make a statute apply retroactively by stating that intent; it is also necessary that retroactive application be constitutionally permissible. See Smiley v. State, 966 So.2d 330,336 (Fla.2007); Maronda Homes, Inc. of Florida v. Lakeview Reserve Homeowners, Inc., 127 So.3d 1258,1272 (Fla.2013); Metropolitan Dade County v. Chase Federal Housing Corp., 737 So.2d 494,499 (Fla.1999). When a criminal punishment statute is made more lenient, the legislature can usually apply it retroactively by expressing that intent. But when, as here, a criminal punishment statute is made harsher, the legislature couldn't apply it retroactively if it wanted to because of the constitutional protection against ex post facto laws. So it would be pointless to include any retroactivity language one way or the other.

The presence or absence of express retroactivity language in a statute or amendment is not necessarily dispositive, and the ordinary methods of statutory construction must give way to the preservation of constitutional protections. See Horsley v. State, 160 So.2d 393,405-06 (Fla.2015). And even apart from that, "[i]t

must be kept in mind that the presumption against retroactivity is only a default rule of statutory construction [and] [t]he essential purpose of statutory construction is to determine legislative intent." Metropolitan Dade County v. Chase Federal Housing Corp., 737 So.2d at 500. Since the policy rationale for disfavoring the retroactive operation of penal statutes is that they "can be harsh and implicate due process concerns" [Id., at 499], then it should be considered whether the Florida legislature would oppose a defendant voluntarily waiving parole eligibility and ex post facto claims, and accepting the harsher "without parole" sentence which was authorized at the time of resentencing but had not yet been adopted at the time of the crime. We do know that "the Legislature has consistently demonstrated its opposition to parole, abolishing this practice for non-capital felonies in 1983, for first-degree murder in 1994, for all capital felonies in 1995, and for any sentence imposed under the Criminal Punishment Code in 1997." Horsley v. State, supra, at 407 (emphasis supplied). With that backdrop, consider the New Jersey Supreme Court's analysis of legislative intent in State v. Fortin, 843 A.2d 974,1012-13 (N.J. 2004)(emphasis supplied):

> We conclude that the policy objectives of the legislation clearly support the most far-reaching application of the statute. That means the statute embraces all capital murder cases proceeding to the penalty phase after the legislation's effective date, provided that, in cases in which the murder preceded the effective date, the defendant must be willing to waive the protection of the Ex Post Facto Clause. We reach this result for several reasons. One of the obvious statutory objectives was to eliminate recidivism for those who commit society's most abhorrent crimes. In those cases in which the penalty-phase jury finds beyond a reasonable doubt an aggravating factor but does not return a death verdict, the Legislature upgraded the punishment from thirty years to life with a thirty-year parole

> disqualifier to life without parole, thus removing any chance of the convicted murderer's release. We cannot discern any reason why the Legislature would not have wanted to extend that punishment to the greatest number of cases constitutionally permissible. Additionally, assuming that the odds of a death verdict increase if the jury does not have the option of a life-without-parole sentence, we cannot discern any reason why the Legislature would have wanted to divide the fates of defendants, who had yet to proceed to the penalty phase, between those whose crimes occurred before and after enactment of *N.J.S.A.* 2C:11-3b(4). The legislative goal of proportionality in capital sentencing favors similar treatment for similarly situated defendants, to the extent possible. *N.J.S.A.* 2C:11-3(e). Applying *N.J.S.A.* 2C:11-3b(4) to the greatest number of cases constitutionally permissible furthers the goal of proportionate sentencing. We also are mindful that when a criminal statute is at issue, "we are guided by the rule of lenity" and "interpret ambiguous language in favor of a criminal defendant." State v. Livingston, 172 N.J. 209, 2018, 797 A.2d 153, 158 (2002). In light of the purpose of the new law, in cases such as this one, we cannot find a legislative intent to have a jury return a death verdict only because it did not have the option of returning a life-without-parole sentence.

Given the Florida legislature's often expressed hostility to parole, it is pretty clear that it would have no problem with an agreement like the one reached - - on the prosecution's initiative - - in the Carlos Bello case, where the defendant agreed to waive his parole eligibility and any ex post facto claims in exchange for a sentence of life imprisonment. [See Johnson's initial brief, p. 46-47]. Nor, in the context of the instant case, is it reasonable (or constitutionally permissible) to discern a legislative intent to make the life without parole option available to those defendants with whom the state wishes to bargain, but unavailable to those defendants whom the state wishes to execute. Fortin.

D. "Illegal Sentence"

The crux of the state's argument on appeal is that imposition of a sentence of life imprisonment without the possibility of parole would have been an illegal sentence, and "[t]he parties may not, even by agreement, allow the trial court to impose such a sentence. Williams v. State, 500 So.2d 501 (Fla.1986)." (SB 25). That, in fact, is also the crux of the majority opinion in Bates, 750 So.2d at 11 (citing Williams for the same proposition), as well as the overruled Mississippi decisions discussed in the last section.

This portion of Johnson's reply brief will address two related questions bearing on the state's main contention: (1) what exactly is meant by the term "illegal sentence"? and (2) what is the nature of the state's dog in this fight? In connection with the latter question, it will be shown that the state's position on the supposed illegality of a life without parole sentence for a capital defendant whose crime occurred before the 1994 amendment but whose resentencing is taking place long afterward varies from case to case (and from trial prosecutor to appellate prosecutor), depending on where the state's interests are perceived to lie.

The concept of an "illegal sentence" which may be corrected at any time and which may not be imposed under any set of circumstances, not even by agreement of the parties, evolved primarily in the context of noncapital sentencing. Defining such a sentence has been an evolving process which has proved "somewhat elusive". Carter v. State 786 So.2d 1173 1175-78,1181 (Fla.2001). In Carter - - which was decided nearly two years after the "illegal sen-

tence" concept was accepted by the Bates majority as its reason to conclude that a capital defendant can never waive his parole eligibility - - this Court discussed its prior efforts to come up with a workable definition, noting that one of those definitions may have been too narrow and another may have been overly broad. Carter, at 1176-78. The new definition formulated in Carter is that an "illegal sentence" must impose a kind of punishment which no judge under the entire body of sentencing laws "could possibly inflict under any set of factual circumstances". 786 So.2d at 1181 (emphasis supplied); see, e.g., Martinez v. State, 169 So.3d 170 (Fla.4th DCA 2015); Durant v. State (Fla.5th DCA 2015)[2015 WL 5883412].

Is a retrospective sentence of life imprisonment without parole - - imposed on a capital defendant who has knowingly and intelligently waived his right to parole eligibility and his protection against ex post facto laws - - a kind of punishment which no judge in Florida could ever possibly inflict under any set of factual circumstances? The prosecution didn't think so in Carlos Bello's resentencing proceeding, where it was the state which proposed and insisted upon Bello waiving his rights and accepting a sentence of life without parole, as a condition of the state's agreement not to pursue a death sentence (4/698-735; 5/736-65). State Attorney Cervone apparently didn't think so in the instant case, where - - when confronted with the state's insistence on and agreement to the life without parole sentence in Bello - - replied that there was a "very real difference" between the two cases (5/811). "So whatever happened in Tampa by plea negotiation and not over the objection of one party, specifically

the State. I do object to this" (5/811). [Defense counsel replied that she thought the objection "is somewhat unfair in the sense that I don't think Mr. Cervone has any objection to the idea of Mr. Johnson waiving his right to parole. He simply objects to the jury knowing about it" (5/811-12)].

In its answer brief on appeal, the state avoids any mention of the Bello resentencing or Mr. Cervone's "Hillsborough I win, Polk you lose" differentiation between the state insisting on one defendant's waiver of his parole eligibility when the state is amenable to a life sentence, yet blocking another defendant's waiver of his parole eligibility when the state is determined to obtain the death penalty for him (SB 21, 24-27). The state does, however, argue on appeal that Johnson's "offer to waive ex post facto is merely that - an offer, unilaterally made by the defense, rejected by the state" (SB 27).

So the state apparently believes that there are factual circumstances in which a Florida judge can accept a defendant's waivers and impose a life without parole sentence; i.e., in those cases where the state proposes, insists on, or consents to those waivers. This completely undercuts the state's main argument (and the underpinning of Bates) that the defendant's waiver of his parole eligibility necessarily results in an "illegal sentence" which can never be imposed even by agreement (SB 25).

Does a capital defendant's waiver of his right to parole eligibility depend on whether or not he can obtain the prosecutor's consent? In a case such as Johnson's the prosecutor's motivation to block the waiver is not altruistic or paternalistic - - his goal is that the defendant be put to death, not to pre-

serve for him an opportunity to someday be freed from prison. [When, in the instant case, defense counsel suggested that the prosecutor's true concern was not that Johnson retain his "right" to the (unwanted) possibility of parole, but simply went to what the jury would hear about his parole eligibility or ineligibility, the prosecutor did not take issue with her statement (5/811-13)].

It is well established that a competent defendant may waive a constitutional right. Johnson v. Zerbst, 304 U.S. 458,464 (1938). The protection against ex post facto laws is no exception. See Bowles v. Singletary, 698 So.2d 1201 (Fla.1997); State v. Fortin, 843 A.2d 974,1013-15 (N.J.2004); State v. McDonnell, 987 P.2d 486, 493-94 (Or.1999); United States v. Harrison, 393 F.3d 805(8th Cir.2005); United States v. Silva, 554 F.3d 13, 22 (1st Cir.2009). In Fortin where, as here, the capital defendant expressly waived his parole eligibility and any ex post facto claims so that the jury could be instructed on the life without parole option as an alternative to death, the New Jersey Supreme Court recognized that "[t]he decision whether to waive a constitutional right is personal to the defendant; it belongs to him, not the attorney, and certainly not to an administrative officer of the Office of the Public Defender." 843 A.2d at 1014. "So long as the waiver procedure demonstrates that a defendant's decision was knowing, intelligent, and voluntary, the waiver is impervious to challenge on appeal." 843 A.2d at 1014.

In McDonnell, the Supreme Court of Oregon held that - - under both Oregon constitutional analysis and United States constitutional analysis - - a defendant can validly waive his ex post facto protections against retroactive application of the life

without parole option. When the same issue came up a year later in State v. Rogers, 4 P.3d 1261,1267 (Or.2000)(emphasis supplied), the Oregon Supreme Court observed:

> In McDonnell, this court held that the defendant's decision not to invoke the protection of the ex post facto clauses constituted a waiver of those constitutional protections and that his arguments to the trial court and his written waiver indicated that his decision not to invoke his constitutional protections against ex post facto laws was an intentional relinquishment of a known right. 329 Or. at 389, 392, 987 P.2d 486. Similarly here, defendant intentionally decided not to invoke the protection of the ex post facto clauses. That decision constituted a waiver of the protection afforded by those clauses.
>
> That the state objected to defendant's waiver in this case, whereas, in McDonnell, it did not, makes no difference to the result. As this court observed in McDonnell, the "claim [that application of ORS 163.150(5)(1993) violated the prohibition against ex post facto laws] was defendant's to assert, and he did not do so." 329 Or. at 390, 987 P.2d 486. Any objection by the state to defendant's waiver of the protection of the ex post facto clauses has no effect. Because defendant did not invoke those constitutional protections in this case, he waived those protections.

To put it simply, while a prosecutor may have a tactical reason to block a defendant's waiver - - since assurance of parole ineligibility is a potentially powerful reason why jurors might choose life, while concern about possible parole release is an improper (but equally powerful) reason why jurors might choose death - - a prosecutor has no legitimate reason to object. As Justice Anstead pointed out:

> What then is a possible reason that waiver would not be permitted where the waiver would be perfectly consistent with prevailing public policy and the only one affected by the more severe sentencing option is the defendant? One can only speculate that it would be to deprive the defendant of the benefit of the appeal to be made to sentencing juries and judges under the 1994 sentencing scheme that if they choose a life sentence over death they can be assured that life means life and the convicted murderer will not be eligible for parole.

Bates, 750 So.2d at 21-22 (Anstead, J., joined by Pariente, J., and Kogan, Senior Justice, dissenting).

It is worth noting that there is no right to parole and no constitutional right to parole eligibility; it is simply "a matter of legislative grace." Cochran v. State, 476 So.3d 207,208 (Fla. 1985); Greenholtz v. Inmates of the Nebraska Penal and Correctional Complex, 442 U.S. 1, 7(1979). "That the state holds out the possibility of parole provides no more than a mere hope that the benefit will be obtained"; an expectation "no more substantial than the inmate's hope that he will not be transferred to another prison". Greenholtz, at 11 (emphasis in opinion). A capital defendant's eligibility for parole is a speculative benefit at best, and there is no valid public policy reason why he should not be able to waive it, with or without the state's consent, especially in light of the importance of the countervailing Eighth Amendment requirement of heightened reliability in capital sentencing. See, e.g., Allen v. Butterworth, 756 So.2d 52,59 (Fla.2000); Caldwell v. Mississippi, 472 U.S. 320,329 (1985). Jurors' understanding of a life without parole sentencing option "can make a crucial difference in whether [they vote] for life or death." Perry v. State, 801 So.2d 78,83 (2001); see Simmons v. South Carolina, 512 U.S. 154,159,163-64 (1994); People v. LaValle, 817 N.E.2d 341,357-58,783 N.Y.S.2d 485,501-02 (2004).

In a somewhat analogous waiver issue, this Court has recognized that "the defendant alone may waive an advisory jury in the penalty phase of a capital case . . . and we hold that the State's consent is not required." State v. Hernandez, 645 So.2d 432,435 (Fla.1994). Unlike parole eligibility and ex post facto protec-

tion, the advisory jury proceeding exists not only for the defendant's benefit but also to assist the trial judge in deciding whether to impose death or life imprisonment. For this reason, the judge retains the options of dispensing with a penalty jury or requiring a jury recommendation notwithstanding the defendant's waiver. Hernandez, 645 So.2d at 435. But the state has no say in the matter.

Where a defendant waives his parole eligibility and his ex post facto protections, there is no logical reason to give a trial judge de facto veto power over the waivers, since those rights are solely for the defendant's benefit. Moreover, Judge Jacobsen made it pretty clear that he would have allowed Johnson to waive his parole eligibility if he thought it was within his discretion to do so.

To summarize, a sentence of life imprisonment without parole for a person whose first-degree murder was committed prior to the 1994 amendment is not an illegal sentence if the defendant knowingly and intelligently waives his right to parole eligibility and his protection against ex post facto laws. The validity of the waivers and the legality of the sentence do not depend on the prosecution's objectives, tactics, or whim.

E. Split Among States

The state on appeal insists on treating this issue as if it were solely a matter of Florida sentencing law (SB 21, 24-27). Even if that were true, the state's contention that the waivers would necessarily result in an "illegal sentence" should fail as a matter of law, public policy, logic, and basic fairness. See

Parts C and D, supra. But the refusal to allow Paul Johnson to waive his parole eligibility also gives rise to a constitutional violation, because the Eighth and Fourteenth Amendments require a heightened level of reliability in any decision to recommend or impose the death penalty. Allen v. Butterworth; Caldwell v. Mississippi. Jurors should not have to concern themselves with the possibility that life imprisonment might mean something different than actual imprisonment for life; that is neither a valid aggravating factor nor a proper consideration for judge or jury. Norris, 429 So.2d at 690; Urbin, 714 So.2d at 420. Yet we also know that jurors are very likely to consider it. See Perry, 801 So.2d at 83; Simmons v. South Carolina, 512 U.S. at 159; People v. LaValle, 817 N.E.2d at 357-58. Allowing a defendant to waive his parole eligibility in order to have the jury plainly and correctly instructed that its sentencing alternatives are death or life imprisonment without parole ameliorates this danger. Conversely, if the defendant is prevented from waiving his rights, and the jurors are therefore faced with the stark options of death or life with the possibility of parole, they are likely to err on the side of death. Such a "Hobson's choice" impairs the reliability of a jury's penalty phase verdict for the same reason as the stark options of a first-degree murder conviction or an acquittal impairs the reliability of a capital guilt-phase verdict. See Beck v. Alabama, 447 U.S. 625 (1980); Eaddy v. State, 638 So.2d 22 (Fla. 1994). For this reason, it is reversible error of constitutional dimension to refuse to accept a capital defendant's waiver of the statute of limitations defense, and to refuse to instruct the jury on time-barred lesser offenses. Beck; Eaddy. Similarly,

refusal to accept a capital defendant's waiver of his parole eligibility and his protection against ex post facto laws amounts to prejudicial Eighth Amendment error.

Appellate courts of last resort in at least five states - - Oregon, Mississippi, New Jersey, Oklahoma, and Kentucky - - have held that a capital defendant has a constitutional right to waive his parole eligibility and his protection against ex post facto laws.[2] At least five other state appellate courts - - in Arizona, Maryland, Tennessee, North Carolina, and Indiana - - have reached the opposite conclusion.[3] Since this is an Eighth Amendment issue, it is not one on which the states can simply agree to disagree, at least not indefinitely. Among the compelling reasons for which the United States Supreme Court will grant certiorari review is the existence of conflicting decisions on issues of constitutional law among state courts of last resort. See U.S. Supreme Court Rule 10; Braxton v. United States, 500 U.S. 344,347 (1991); City and County of San Francisco, Calif. V. Sheehan, 135 S.Ct. 1765,1779 (2015)(Scalia, J., joined by Kagan, J., concurring in part and dissenting in part).

In State v. McDonnell, 987 P.2d at 495, the Oregon Supreme Court - - having determined that the defendant was entitled under the Oregon Constitution to waive his protection against ex post

---

[2] See State v. McDonnell, 987 P.2d 486,493-96 (Or.1999); Barnett v. State, 725 So.2d 797,801-02 (Miss.1998); State v. Fortin, 843 A.2d 974,1010-15 (N.J.2004); Salazar v. State, 852 P.2d 729,736-41 (Okla.Cr.1993); Furnish v. Commonwealth, 95 S.W. 3d 34,50-51 (Ky. 2002).

[3] See State v. Dann, 207 P.3d 604,625-26 (Ariz.2009); White v. State, 589 A.2d 969,974 (Md.1991); State v. Keen, 31 S.W.3d 196, 213-18 (Tenn.2000); State v. Fullwood, 472 S.E.2d 883,891-92 (N.C.1996); State v. Alcorn, 638 N.E.2d 1242,1244-46 (Ind. 1994).

facto laws in order to have the jury instructed on the life without parole sentencing option - - turned to the question of whether the same result would obtain under the United States Constitution. While recognizing that the U.S. Supreme Court had not yet decided that issue, the Oregon Supreme Court was satisfied that that Court would conclude that ex post facto protections are waivable under such circumstances. 987 P.2d at 495.

F. Shield or Sword?

In reaching its prediction that the U.S. Supreme Court would conclude that a capital defendant may waive his right to parole eligibility and his protection against ex post facto laws, the Oregon Supreme Court in McDonnell was aided by its analysis of Lynce v. Mathis, 519 U.S.433 (1997), a decision which is also cited in the state's answer brief in the instant case (SB 26). Whether viewed under the Florida or the United States constitutions, the presumption against retroactive application of new laws is a shield for the protection of the individual against the sovereign [Lynce, 519 U.S. at 439-40], not a sword which the government may use to help it obtain the harshest of all sentences - death.

When a defendant facing a potential death sentence makes a voluntary and intelligent decision to waive his protection against retroactive application of the life without parole sentencing option - - in order to help his chances of avoiding the death penalty and in order to prevent the jury from being swayed by improper considerations - - the state has no legitimate interest in blocking him from doing so; and refusal to permit the waivers

compromises the reliability of the jury's penalty verdict. See especially Salazar v. State, 852 P.2d 729,739 (Okla.Cr.1993). The fundamental unfairness of the state's using a defendant's "rights" as a weapon against him is compounded when the state only objects to the waivers when the defendant is facing a jury penalty trial, but has no problem proposing and insisting on the same waivers when the state is amenable to an agreement for a life sentence. It is the state - - not Paul Johnson - - which has been selecting which sentencing statute should apply based on what suits them. (See SB 26-27). Johnson, on the other hand, is simply seeking to waive a benefit conferred by legislative grace - - a "benefit" which, in the context of death penalty proceedings, will do him precious little good but might cause him the ultimate harm.

G. Harm

In order to prevail under the "harmless error" concept, the burden is on the state - - as the beneficiary of the error - - to show beyond a reasonable doubt that the error could not have contributed to the verdict. State v. DiGuilio, 491 So.2d 1129, 1135,1138 (Fla.1986). In the instant case, the state on appeal makes no attempt even to contend that the refusal to allow Johnson to waive his parole eligibility was harmless, much less meet its burden of showing that the unavailability of a life without parole sentencing option could not have contributed to the jury's penalty decision (SB 21, 24-27). Since the Attorney General's office is well aware of the harmless error doctrine, and since the state's answer brief is nowhere near the page limit, it is fair to assume that the state made no effort to meet its burden because it

understood - - as the trial prosecutor evidently did as well - - that a life without parole option could very possibly have been viewed by jurors as a satisfactory alternative to the death penalty.

When the state does not contend that an error was harmless, the appellate court may choose to go no further, or it may consider on its own whether the error was harmless beyond a reasonable doubt under the DiGuilio test. See Ciccarelli v. State, 531 So.2d 129,131 (Fla.1988); Heuss v. State, 687 So.2d 823 (Fla.1996).

If this Court determines that Johnson should have been allowed to waive his right to parole eligibility and his protection against ex post facto laws, and that the jury should accordingly have been instructed on the life without parole sentencing alternative, the error is patently harmful. This Court has recognized that "a juror's understanding of a life without parole sentencing option can make a crucial difference in whether the juror votes for life or death." Perry v. State, supra, 801 So.2d at 83, citing Simmons v. South Carolina, supra. Public opinion surveys cited in Simmons, 512 U.S. at 159; State v. Fortin, supra, 843 A.2d at 604-05, and People v. LaValle, supra, 817 N.E.2d at 357,783 N.Y.S.2d at 501 confirm that jurors' concern about possible parole is an important factor in capital sentencing outcomes, and that jurors are predisposed to believe that inmates serving life sentences are often released after serving relatively little prison time. Jurors may also be aware that prison time already served by a defendant may count toward his parole date. See Waterhouse v. State, 596 So.2d 1008,1015 (Fla.1992). This could be an especially worrisome concern for jurors in Johnson's case,

where the crimes occurred 32 years before his resentencing trial. See Hitchcock v. State, 673 So.2d 859,863 (Fla. 1996); contrast Gore v. State, 706 So.2d 1328,1333 (Fla.1997).

During voir dire examination of prospective jurors for Johnson's penalty retrial, the first group questioned (a group which included seven of the twelve persons who served on the jury)[4] acknowledged their uncertainty about whether a life sentence actually meant a life sentence where you spend the rest of your life in prison, and those jurors agreed that they would want to have an instruction from the judge about the meaning of a life sentence (18/647-55).

Argument by defense counsel - - whom jurors understand is an advocate - - that her client is unlikely to be released on parole is no substitute for an instruction by the trial court that the defendant, if not sentenced to death, will be sentenced to life imprisonment without possibility of parole. "[A]rguments of counsel generally carry less weight with a jury than do instructions from the court." Boyde v. California, 494 U.S. 370,384 (1990), quoted in Cliff Berry, Inc. v. State, 116 So.3d 394,412 (Fla.3d DCA 2013). In assessing the comparative impact of the court's instructions and counsel's argument it must be recognized that "particularly in a criminal trial, the judge's last word is apt to be the decisive word." Cliff Berry, Inc., 116 So.3d at 412; Blitch v. State, 427 So.2d 785,787 (Fla.2d DCA 1983), quoting Bollenbach v. United States, 326 U.S. 607 612 (1946). Jurors are "ever watchful of the words that fall from [the judge]", Bollen-

[4] Haggins, Yates, Alexander, McKelvey, Wilkerson, Motzenbecker, and Miner.

bach, at 612, and for that reason "arguments of counsel cannot substitute for instructions by the court." Taylor v. Kentucky, 436 U.S. 478,488-89 (1978); Carter v. Kentucky, 450 U.S. 288,304 (1981).

In Wade v. State, 825 P.2d 1357,1363 (Okla.Cr.1992), the Oklahoma Court of Criminal Appeals said "[W]e cannot find the error to be harmless. We cannot predict what effect the option of life without parole may have had on the jury's sentencing." In State v. McDonnell, supra, 987 P.2d at 495-96, the Oregon Supreme Court held that the trial court's decision not to instruct the jury on the life without parole option "was not a harmless error. A properly instructed jury might have returned a verdict supporting a sentence other than death."

In Johnson's instant appeal the state did not even attempt to meet its burden of showing beyond a reasonable doubt that the absence of a life without parole alternative could not have contributed to the jury's decision to recommend a death sentence. Nor could it have met that burden had it tried. Judge Jacobsen was all too aware that his ruling precluding Johnson's waivers might well be wrong and might ultimately result in reversal, but he was bound by Bates and Orme. This Court, however, is not required by stare decisis to perpetuate the flawed legal analysis and the unjust consequences wrought by Bates and Orme, and by the state's selective use of that case law. This Court concluded in Orme that the appellant in that case had shown "no reason for us to recede from [Bates]. 25 So.3d at 546-47. Johnson, in contrast, has shown multiple compelling reasons - - based on state sentencing law; ex post facto and related constitutional princi-

ples; and the Eighth Amendment - - why this court should recede from Bates. Johnson's death sentence should be reversed now rather than later. See Salazar v. State, 852 P.2d at 740.

ISSUE II

THE TRIAL COURT ERRED BY DENYING THE SUPPLEMENTAL MOTION FOR NEW PENALTY PHASE PROCEEDING.

The State asserts the trial court erroneously denied its request to strike the supplement to the motion for new trial based on failure to comply with the timeliness requirements of Fla.R.Crim.P. 3.290 (SB p. 28-29). The State notes the trial court declined the request to strike because the facts on which the challenge to the venire was based did not come to light until after the trial (SB p. 29). However, the trial court properly declined the State's request to strike. The rules of procedure should be construed to provide for the just determination of every criminal proceeding. Florida Rule of Criminal Procedure 3.020 ("These rules are intended to provide for the just determination of every criminal proceeding. They shall be construed to secure simplicity in procedure and fairness in administration."); See State v. Glover, 564 So.2d 191 (Fla. 5th DCA 1990) (relying on Fl.R.Crim.P. 3.020, the court found the defendant was entitled to a new trial based newly discovered witnesses even though motion for new trial was untimely).

The State agrees that the pool from which Johnson's venire was drawn was not updated between 2010 and 2013 which resulted in a failure to call some Polk County residents in for jury duty (SB p. 28), but later asserts "no violation of Florida law occurred."

(SB p. 28). Johnson disagrees and asserts, as he did in the Initial Brief at 53-56, 69-70 that Chapter 40, Florida Statutes, Tenth Circuit Amended Local Rule No. 2, and Administrative Order 7-2.2 were violated by the systematic exclusion of young persons and persons who moved into or within Polk County.

The State asserts "The clerk's selection of persons who were older than 21, as apparently occurred in Johnson's case, remains a lawful application of the statute, despite the fact that younger residents were inadvertently excluded from jury service at the time of Johnson's trial." (SB p. 31). The State apparently finds there was no need to fix the problem because no problem existed. The exclusion of young persons and persons who moved into or within the county was not inadvertent. It was the foreseeable result of failing for several years to update the list from which venires were drawn.

The State asserts Johnson's constitutional challenge is unavailing because he cannot meet the three prongs of Duren v. Missouri, 439 U.S. 357 (1979) (SB p. 31-35). Mr. Johnson disagrees and asserts, as he did in the Initial Brief, that all the three prongs of Duren were met.

The excluded group is a distinctive group in the community. The State relies on Bryant v. State, 386 So. 2d 237 (Fla. 1980), and Barber v. Ponte, 772 F.2d 982 (1st Cir. 1985) in asserting young people are not a cognizable class (SB p. 32-33). The State ignored cases cited in the Initial Brief that held that young people constitute a cohesive unit or distinctive group for Sixth Amendment jury challenges: State v. Holmstrom, 168 N.W. 2d 574,

578 (Wis.1969); State v. Pruit, 289 N.W. 2d 343, 346 (Wis.App.1980); People v. Marr, 324 N.Y.S.2d 608 (1971).

Additionally, as was asserted in the Initial Brief at 59-67, judicial recognition of distinctive groups has evolved and is evolving. Over the years courts have come to recognize black people, women, daily wage earners, Native Americans, Hispanics, Jews, lesbians, and gay men as distinctive groups. Expert testimony was presented at the evidentiary hearing that young people think of themselves as distinctive, as do their elders. Florida laws treat young people as distinctive: §§ 39.013, 316.211(3)(b)&(6), 562.11, 710.102, and 768.18, Fla. Stat. "When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable." Peters v. Kiff, 407 U.S. 493, 503 (1972). The defense satisfied the first prong of Duren.

The representation of the excluded group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community. The State asserts the evidence at the evidentiary hearing fails to establish this prong (State's Answer Brief at 34-35). However, evidence of total exclusion of the excluded group satisfies Duren's second prong.

Satisfying the third prong of the Duren test requires only that the exclusion is systematic or "inherent in the particular jury-selection process utilized." Duren *at 366.* From early 2010 to April 2013, there was no updating of the venire file which resulted in excluding from Mr. Johnson's jury pool all persons

who were 18 to 21, persons who moved to Polk County, and persons who moved within the county without a forwarding address (v10/R1766, 1774-1775, 1781-1783, 1795-1796, 1817-1819; v11/R1843-1844, 1846-1847, 1853-1855, 1860, 1867, 1898-1899, 1905-1913; v12/R2056-2057; v13/R2196, 2208, 2221, 2234, 2257-2258, 2269, 2272). This evidence of systematic exclusion satisfies the third prong of Duren.

Mr. Johnson was denied his constitutional rights to due process and a fair trial under the 6th and 14th Amendments to the United States Constitution and Article I, Sections 9 and 22 of the Florida Constitution. The case must be reversed for a new trial.

CONCLUSION

Johnson will rely on his initial brief with regard to the remaining issues on appeal. Based on the argument, reasoning, and citation of authority presented in his initial brief and this reply brief, he respectfully requests that this Court reverse his death sentence and remand (if the state continues to pursue the death penalty) for a new penalty trial.

CERTIFICATE OF SERVICE

I certify that a copy has been e-mailed to Assistant Attorney General Timothy A. Freeland at Capapp@myfloridalegal.com, on this 11th day of December, 2015.

CERTIFICATION OF FONT SIZE

I hereby certify that this document was generated by computer using Microsoft Word with Courier New 12-point font in compliance with Fla. R. App. P. 9.210 (a)(2).

Respectfully submitted,

HOWARD L. "REX" DIMMIG, II
Public Defender
Tenth Judicial Circuit
(863) 534-4200

/S/JOHN C. FISHER
Assistant Public Defender
Florida Bar Number 0999865
P.O. Box 9000 - Drawer PD
Bartow, FL 33831

STEVEN L. BOLOTIN
Assistant Public Defender
Florida Bar Number 0236365
P.O. Box 9000- Drawer PD
Bartow, FL 33831
jfisher@pd10.org
sbolotin@pd10.org
mlinton@pd10.org
appealfilings@pd10.org

SLB/ml